

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION and
THE AMERICAN CIVIL LIBERTIES UNION
FOUNDATION,

Plaintiffs,

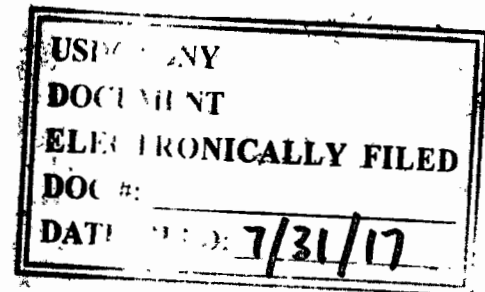
v.

DEPARTMENT OF DEFENSE, DEPARTMENT
OF JUSTICE, including its components the
OFFICE OF LEGAL COUNSEL and OFFICE OF
INFORMATION POLICY, DEPARTMENT OF
STATE, and CENTRAL INTELLIGENCE
AGENCY,

Defendants.

**ORDER GRANTING
SUMMARY JUDGMENT FOR
DEFENDANTS WITH
RESPECT TO DOCUMENT 1,
UPHOLDING EXEMPTIONS**

15 Civ. 9317 (AKH)



ALVIN K. HELLERSTEIN, U.S.D.J.:

Oral argument on the Government's motion for summary judgment was held on March 29, 2017. During the *ex parte* portion of that hearing, I made preliminary rulings for all but two of the documents at issue, Documents 10 and 66, and reserved judgment on those two documents. A partially-redacted transcript of the *ex parte* session was provided to plaintiffs on March 30, 2017, in the interest of providing as much of a public record as possible. Document 1, a Memorandum of Notification issued by President George W. Bush on September 17, 2011, was considered by the Government to be particularly sensitive. My preliminary ruling with regard to that document, holding it exempt from disclosure under Exemptions 1 and 3, was redacted because of the concern that my ruling would reveal classified information.


Because of the importance and sensitivity of this document, I allowed for time to pass before reviewing the document a second time. On July 26, 2017, I conducted this additional

review, and on July 27, 2017, I held a second *ex parte* session with the Government in my chambers, at which I delivered my final rulings with respect to Document 1, providing a more detailed, public explanation for that decision. The transcript of the July 27 session, which is attached to this Order as Appendix A, contains no redactions, and serves as my final ruling with respect to Document 1.

An opinion addressing the remaining documents at issue, including Documents 10 and 66, will be forthcoming.

SO ORDERED.

Dated: July 31, 2017
New York, New York


ALVIN K. HELLERSTEIN
United States District Judge

Appendix A

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 AMERICAN CIVIL LIBERTIES
4 UNION, et al.,

5 Plaintiffs,

6 v.

15 CV 9317 (AKH)

7 THE DEPARTMENT OF DEFENSE, et
8 al.,

9 Defendants.

10 New York, N.Y.
11 July 27, 2017
12 12:00 p.m.

13 Before:

14 HON. ALVIN K. HELLERSTEIN,

15 District Judge

16 APPEARANCES

17 JOON H. KIM

18 Acting United States Attorney for the
19 Southern District of New York

20 BY: SARAH NORMAND

21 Assistant United States Attorney

22 ALSO PRESENT: Michael Sochynsky, law clerk
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1 (In chambers)

2 THE COURT: This is an ex parte *in camera* session
3 convened pursuant to my request. Present is Sarah Normand, who
4 is representing the government; my law clerk, Michael
5 Sochynsky, who has been cleared for all but the particular
6 document in issue; and the court reporter, who is not cleared
7 to read the particular document. The reporter who is cleared
8 is not available today. However, my rulings will not describe
9 the document, except that which already has been used to
10 describe it publically.

11 Therefore, after having discussed the particular issue
12 with Ms. Normand, we thought it appropriate to issue these
13 rulings publically but subject to a caveat without the need to
14 exclude my law clerk and to use Ms. Thun as the reporter. The
15 caveat is that although I intend this to be public, the
16 government wishes 24 hours to review the transcript to make
17 sure that there has been no error in allowing it to be public.
18 Therefore, the government has leave to make that review and to
19 make whatever application it thinks fit by, let us say, the
20 close of business Monday.

21 MS. NORMAND: Thank you, your Honor.

22 THE COURT: This proceeding came about because I
23 wanted to delay issuing my opinion on the rulings I made when I
24 last heard this case on March 29th, 2017. Because of the
25 importance of the various rulings I made in respect to the

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1 importance of the documents I reviewed, I wanted time to ask so
2 that the initial responses I made would have time to sit and I
3 could then as necessary conduct additional reviews. To that
4 end I asked Ms. Normand if she would bring to chambers the
5 particular document, which we are discussing now, the
6 presidential memorandum of notification, which has been argued
7 by the government to qualify as exempt from production.

8 Regarding this document, the government states that it
9 made certain findings and authorized the CIA to capture and
10 detain terrorists, and in the amended Vaughn Index exemptions
11 were justified on the argument that the material was properly
12 classified because it reflects intelligence sources and
13 methods. The government stated that the memorandum of
14 notification was a highly classified and extraordinarily
15 sensitive document. In a document submitted to me *in camera* --
16 may I identify the declaration?

17 MS. NORMAND: Yes.

18 THE COURT: -- Ms. Shiner's declaration, the
19 government states that its identification was sufficient
20 because the very description of the document would necessarily
21 disclose the classified information it seeks to protect.

22 ACLU argued that the government did not sufficiently
23 justify its withholding under Exemptions 1 and 3 with
24 reasonable specificity and without resort to conclusory and
25 generalized allegations of exemption. The ACLU argued that the

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1 Court is required to require the agency to create as full a
2 public record as possible concerning the nature of the
3 documents and the justification for nondisclosure.

4 Furthermore, *in camera* affidavits should be discouraged because
5 of their negative impact on the effective functioning of the
6 adversarial system. The ACLU argued that it did not have a
7 meaningful opportunity to challenge the grounds for withholding
8 set out in an affidavit it could not see and the ACLU argued
9 that there already is in the public sphere a more detailed
10 description of this same memorandum of notification.

11 In related litigation, 04-cv-4151, there is the Dorn
12 declaration found at Docket NO. 226 at paragraph 67, in which
13 the government identified the length of the document, the fact
14 that the author of the document was the President, to whom the
15 document was distributed, who authored the 2-page cover
16 memorandum, and the substance of the memorandum generally.
17 Additionally, the Senate Report quoted a sentence from the
18 memorandum of notification and the citation is Docket No. 53-22
19 at page 36 as follows: "On September 17, 2001, President Bush
20 issued a memorandum of notification that authorized the CIA,
21 among other things -- and there is something redacted -- to
22 conduct operations designed to capture and detain persons
23 posing continuing serious threats of violence or death to U.S.
24 persons of interest or who are planning terrorists activities.
25 In light of this, the ACLU argued that the government's

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1 assertion of confidentiality is more tenuous particularly given
2 that it is not explained why these descriptions from the prior
3 case could be more detailed in the current description.

4 Having all this in mind, I reviewed the memorandum of
5 notification with only Ms. Normand present. Ms. Normand did
6 not make any arguments whatever. She simply brought the
7 document to my chambers and I reread it. Having reread it and
8 having revisited the justifications given, I find that it was
9 properly classified. Exemption 1 provides that if a matter is
10 specifically authorized under criteria established by an
11 executive order to be kept secret in the interest of national
12 defense or foreign policy and it is in fact classified pursuant
13 to such executive order, it may be exempt from production.

14 Executive Order No. 13526 dated December 29, 2009 sets
15 out four criteria for the classification of nationality
16 security information:

17 1: An original classification of clarity must have
18 classified the information;

19 2: The information must be owned by or produced by or
20 for or under the control of the United States government;

21 3: The information must fall within one or more of
22 the categories of information set out in Section 1.4 of
23 Executive Order No. 13526; and

24 4: The original classification authority must have
25 determined that unauthorized disclosure of the information

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1 reasonably could be expected to result in damage to the
2 national security.

3 The original classification of clarity must also be
4 able to identify or describe the damage. That is Executive
5 Order No. 13526 found at 75 FR 707 (December 29, 2009). The
6 reference the Section 1.4 of Executive Order NO. 13526 in turn
7 lists the following categories of information -- I will read
8 just the two that are applicable here. Subparagraph C provides
9 that it covers intelligence activities, including covert
10 action, intelligence sources or methods or cryptology.
11 Subparagraph D provides that exemptions applied to foreign
12 relations or foreign activities of the United States, including
13 confidential sources. After having reviewed the document, it
14 is clear to me that the document should be exempt under both
15 these categories. I don't think it is necessary for me to
16 describe the reasons why that would be so because that would be
17 giving away the document itself and I don't plan to have any
18 sealed supplement to this that does that. The document speaks
19 for itself.

20 The government also seeks exemption under Exemption 3,
21 which covers matters exempt from disclosure by statute other
22 than Section 552(b) of this title. If the statute requires
23 that the matters be withheld from the public in such a manner
24 as to leave no discretion on the issue or establishes
25 particular criteria for withholding refers to particular types

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1 of matters to be withheld and if enacted after the date of
2 enactment of the open FOIA Act of 2009 and specifically cites
3 to this paragraph. That is 5, U.S.C., Section 552(b)(3). The
4 government has identified the National Security Act and the CIA
5 Act as statutes qualifying under Exemption 3. The ACLU does
6 not dispute that these qualify under Exemption 3 statutes, but
7 instead argues that the government failed to satisfy its burden
8 with respect to both Exemptions 1 and 3 through the conclusory
9 and generalized nature of its submission.

10 In this sense, the government's argument that a better
11 identification would divulge too much of the document is
12 accepted. The public information, including the information
13 that became public in this case and other cases and the Senate
14 Report are sufficient to identify the document. That was held
15 by the Second Circuit in 2014 in the case of *N.Y. Times Co. v.*
16 *U.S. Dep't of Justice*, 758 F.3d 436, 440. "We agree with the
17 District of Columbia Circuit that when the itemization and
18 justification letters are themselves sensitive to place them on
19 public record can damage security in precisely the way that
20 FOIA Exception 1 is intended to prevent." Accordingly for
21 these reasons, I hold that the government properly classified
22 the memorandum of notification, each of the criteria set out in
23 the relevant executive order and statute have been satisfied
24 and the government need not disclose the document.

25 Now, I would like also to pass on one more

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1 justification used by the government, namely, that the document
2 reflects a presidential communication. In my judgment that
3 reason for exception, a species of executive privilege, does
4 not extend to documents that are themselves authorizations for
5 action, and this memorandum of notification was and is
6 considered as an authorization for action. Accordingly, I hold
7 that the presidential privilege covering presidential
8 communication does not apply to this document. That is my
9 ruling. I don't think anything is deserving of classification
10 here. It should be public, but Ms. Normand will be given until
11 Monday to review the transcript and make such applications as
12 the government deems just and proper.

13 MS. NORMAND: Thank you your Honor.

14 THE COURT: Thank you.

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